Pacific & Orient Insurance Co Bhd v Hameed Jagubar bin Syed Ahmad

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-137–11 OF 2017(P)
ZULKEFLI PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, AZAHAR MOHAMED AND AZIAH ALI FCJJ
24 SEPTEMBER 2018

Insurance — Motor Insurance — Policy of insurance ('policy') — Whether policy included cover note — Whether period of insurance commenced from date and time cover note issued even though policy only mentioned date when cover would commence — Whether insurer entitled to avoid policy where insured failed to disclose at time of buying policy that his vehicle had already met with an accident — Whether insured had duty under s 150(1) of the Insurance Act 1996 ('the IA') to disclose all relevant information at time of purchasing insurance cover — Whether insurer not required under s 141 of the IA to assume any risk unless premium paid — Insurance Act 1996 s 2

At 1.30am on 27 October 2011, an accident occurred between a motorcycle owned by one Khor Teik Wan ('the insured') and the respondent. During the sessions court trial of a claim brought by the respondent against the insured for damages for injuries suffered in the accident, it was discovered that the insured had obtained insurance cover for the motorcycle from the appellant at 2.16pm on the day of the accident, ie, about 12 hours after the accident occurred. The insurance cover note stated both the date and time of its issuance. The insurance policy ('the policy'), however, stated that the insurance cover period was from 27 October 2011–26 October 2012. The appellant stayed the trial pending an application to the High Court under s 96(3) of the Road Transport Act 1987 for a declaration that the policy was void and unenforceable as the insured had no insurance cover at the time of the accident. The High Court decided in the appellant's favour. On the respondent's appeal, the Court of Appeal ('the COA') set aside the High Court's decision and held that the appellant was liable because the policy became effective at midnight on 27 October 2011. The Federal Court granted the appellant leave to appeal against the COA's decision on the questions: (a) whether the insurance cover took effect from the date the policy was issued or from the time the cover note was given; and (b) whether in view of the fact that s 141 of the Insurance Act 1996 ('the IA') required premium to be paid before there could be assumption of risk by the insurer, the COA was wrong to hold that the policy in the instant case operated retrospectively from midnight on 27 October 2011. At the hearing of the instant appeal, the appellant argued that the COA erred in not considering ss 2 and 141 of the IA. The former not only stated that an

insurance policy included the cover note but also that premium paid for insurance cover was the consideration for the obligations assumed by the insurer. The appellant pointed out that the insured in the instant case had acted in bad faith by not disclosing to the appellant at the time of purchasing the policy that his motorcycle was already involved in an accident.

Held, unanimously allowing the appeal, setting aside the decision of the COA and restoring the decision of the High Court:

(1) The policy under consideration in this appeal was a 'special contract' since the date and time of issuance was mentioned in the cover note. The COA ought to have considered the cover note since s 2 of the IA provided that a policy included the cover note. The cover note was in itself a contract of insurance governing the rights and liabilities of the parties in the event of a loss taking place during its currency. The assured was entitled to enforce the contract in the cover note provided he had complied with its conditions eg as to payment of premium. The COA also ought to have considered s 141 of the IA and regs 63 and 64 of the Insurance Regulations 1996. Section 141 and reg 63 were statutory prohibitions against an insurance company assuming any risk until the premium was paid. Under the Insurance Act, assumption of risk commenced from the time of payment of premium (see paras 31–32 & 40).

(2) A breach of the principle of *uberrimae fide* or utmost good faith by an insured entitled an insurer to avoid the contract. The duty to disclose was provided in s 150(1) of the IA. In the instant case, the insured breached s 150(1) when at the time the policy was issued he did not disclose to the appellant that his motorcycle was already involved in an accident (see paras 35 & 38–39).

(3) An insurance policy took effect from the time of issuance of cover. In the instant case, the COA was wrong in law to have given a retrospective cover to the policy in breach of s 141 of the IA which stated that there shall be payment of premium before cover (see paras 8 & 41).

[Bahasa Malaysia summary

Pada 27 Oktober 2011 pukul 1.30 pagi, satu kemalangan telah berlaku antara motorsikal yang dimiliki oleh Khor Teik Wan ('yang diinsuranskan') dan responden. Sepanjang perbicaraan mahkamah sesyen berhubung suatu tuntutan yang dimulakan oleh responden terhadap perlindungan insurans untuk ganti rugi bagi kecederaan yang dialami dalam kemalangan itu, ia didapati bahawa yang diinsuranskan telah memperoleh perlindungan insurans untuk motorsikal daripada perayu pada 2.16 petang pada hari kemalangan iaitu lebih kurang 12 jam selepas kemalangan itu berlaku. Nota perlindungan insurans itu menyatakan tarikh dan masa keluarannya. Polisi insurans itu

A ('polisi tersebut'), bagaimanapun, menyatakan bahawa tempoh perlindungan insurans adalah dari 27 Oktober 2011–26 Oktober 2012. Perayu telah menggantung perbicaraan tersebut sementara menunggu permohonan kepada Mahkamah Tinggi di bawah s 96(3) Akta Pengangkutan Jalan Raya 1987 untuk satu deklarasi bahawa polisi tersebut adalah tidak sah dan tidak boleh B dikuatkuasakan kerana yang diinsuranskan tidak mempunyai perlindungan insurans pada masa kemalangan tersebut. Mahkamah Tinggi membuat keputusan yang menyebelahi perayu. Atas rayuan responden, Mahkamah Rayuan ('MR') telah mengetepikan keputusan Mahkamah Tinggi dan memutuskan bahawa perayu bertanggungjawab kerana polisi tersebut berkuat C kuasa pada tengah malam 27 Oktober 2011. Mahkamah Persekutuan memberikan perayu kebenaran untuk merayu terhadap keputusan MR tersebut atas persoalan: (a) sama ada perlindungan insurans itu berkuat kuasa dari tarikh polisi tersebut dikeluarkan atau dari tarikh nota perlindungan itu D diberikan; dan (b) sama ada berdasarkan fakta bahawa s 141 Akta Insurans 1996 ('AI') memerlukan premium dibayar sebelum terdapat kemungkinan andaian risiko oleh yang diinsuranskan, MR tersebut telah tekrhilaf kerana memutuskan bahawa polisi tersebut dalam kes ini beroperasi secara kebelakang dari tengah malam 27 Oktober 2011. Semasa perbicaraan rayuan ini, perayu E berhujah babhawa MR tersebut terkhilaf kerana tidak mengambil kira ss 2 dan 141 AI. Perayu bukan sahaja menyatakan bahawa suatu polisi insurans termasuklah nota perlindungan tetapi juga premium yang dibayar untuk perlindungan insurans adalah balasan untuk tanggungjawab yang diandaikan oleh yang diinsuranskan. Perayu menyatakan bahawa yang diinsuranskan F dalam kes ini telah bertindak dengan niat jahat kerana tidak mendedahkan kepada perayu pada masa membeli polisi tersebut bahawa motorsikalnya telahpun terlibat dalam suatu kemalangan.

G **Diputuskan,** sebulat suara membenarkan rayuan, mengetepikan keputusan MR dan mengembalikan keputusan Mahkamah Tinggi:

(1) Polisi yang dipertimbangakan dalam rayuan ini adalah 'special contract' oleh kerana tarikh dan masa keluaran telah dinyatakan dalam nota perlindungan. MR patut mempertimbangkan nota perlindungan itu H oleh kerana s 2 AI memperuntukkan bahawa suatu polisi termasuklah nota perlindungan. Nota perlindungan adalah dengan sendirinya suatu kontrak yang mengawal hak dan liability pihak-pihak sekiranya kerugian berlaku semasa tempoh kuatkuasanya. Yang diinsuranskan berhak untuk menguatkuasakan kontrak dalam nota perlindungan dengan syarat dia I mematuhi syaratnya contohnya berhubung bayaran premium. MR tersebut juga patut mengambil kira s 141 AI dan peraturan-peraturan 63 dan 64 Peraturan-Peraturan Insurans 1996. Seksyen 141 dan peraturan 63 adalah larangan statutori terhadap syarikat insurans yang mengandaikan apa-apa risiko sehingga premium dibayar. Di bawah AI,

andaian risiko bermula dari masa bayaran premium itu (lihat perenggan 31–32 & 40).

(2) Suatu pelanggaran prinsip *ubberimae fide* atau niat sangat baik oleh yang diinsuranskan memberi hak kepada yang diinsuranskan untuk mengelak kontrak itu. Kewajipan untuk mendedahkan diperuntukkan dalam s 150(1) AI. Dalam kes ini, yang diinsuranskan telah melanggar s 150(1) apabila pada masa polisi dikeluarkan dia tidak mendedahkan kepada perayu bahawa motorsikalnya telahpun terlibat dalam kemalangan (lihat perenggan 35 & 38–39).

(3) Suatu polisi insurans berkuat kuasa dari masa keluaran perlindungan itu. Dalam kes ini, MR tersebut telah terkhilaf dari segi undang-undang kerana memberikan perlindungan kebelangan kepada polisi yang melanggari s 141 AI yang menyatkaan bahawa perlu ada pembayaran premium sebelum dilindungi (lihat perenggan 8 & 41).]

Notes

For cases on policy of insurance, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 465–470.

Cases referred to

Carter v Boehm [1558–1774] All ER Rep 18; (1766) 3 Burr 1905 (refd)
Cartwright v MacCormack (Trafalgar Insurance Co Ltd Third Parties) [1963] 1 All ER 11, CA (refd)
London General Omnibus Co Ltd v Holloway [1911–13] All ER Rep 518, CA (refd)
Medical Defence Union Ltd v Department of Trade [1980] Ch 82, Ch D (refd)
Motor & General Insurance Co Ltd v Dorothy Cox and another [1990] 1 WLR 1443, PC (refd)
National Insurance Co Ltd v Smt Jijubhai Nathuji Dabhi (1997) 1 SCC 66, SC (folld)
National Insurance Company Ltd v Mrs, Chinto Devi And Ors (Civil Appeal No 1100 of 1992), SC (refd)
New India Assurance Co Ltd v Smt Sita Bai & Ors [2000] 1 MLJ 50, SC (refd)
New India Assurance Co Ltd v Ram Dayal And Ors 1990 SCR (2) 570; 1990 (2) SC 164, SC (refd)
New India Insurance Co v Bhagwati Devi And Ors (1998) 6 SCC 534, SC (refd)
R v Cohen; Ex parte Motor Accidents Insurance Board (1979) 141 CLR 577; 53 ALJR 719; 27 ALR 263, HC (refd)
Smt Asma Begum And Others v Nisar Ahmed And Others II (1990) ACC 501; 1990 ACJ 832; AIR 1990 Kant 353, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78(2)
Financial Services Act 2013
General Clauses Act 1897 [IND]
Insurance Act 1938 [IND] s 64-VB
Insurance Act 1996 (repealed by the Financial Services Act 2013) ss 2, 141, 150(1)
Insurance Regulations 1996 regs 63, 64
Road Transport Act 1987 s 96(1), (3)

Appeal from: Civil Appeal No P-02(NCVC)(A)-302–02 of 2016 (Court of Appeal, Putrajaya)

R Kamalanathan (Vinod Kamalanathan and Harjinder Singh with him) (Vinod Kamalanathan & Assoc) for the appellant.
Dev Kumaraendran (Harbans Singh, Dalgit Singh and Muhammad Hisham Segaran) (Kumar & Co) for the respondent.

Aziah Ali FCJ (delivering judgment of the court):

INTRODUCTION

[1] This unanimous judgment is delivered by the remaining members of the panel pursuant to s 78(2) of the Courts of Judicature Act 1964 as a member of the panel, the learned President of the Court of Appeal then, has since retired.

[2] In the High Court, the appellant was the plaintiff/insurer. The defendant/insured was the registered owner of a motorcycle No PHS 5512. The plaintiff had issued an insurance policy to the defendant in respect of the motorcycle. The respondent was the intervener.

SALIENT BACKGROUND FACTS

[3] The undisputed facts show that on 27 October 2011 at 1.30am an accident occurred between the defendant and the respondent which involved the defendant's motorcycle. On the same date the defendant applied for insurance cover for the motorcycle. The appellant issued a policy No 01–70–11-PFN-002610. The cover note shows that it was issued on 27 October 2011 at 2.16pm. The certificate of insurance shows that the effective date of commencement of insurance was 27 October 2011 and the date of expiry of the insurance was 26 October 2012.

[4] Arising from the accident, the respondent had filed a claim in the Sessions Court, Georgetown against the defendant for damages for injuries

suffered. It was in the course of the trial that it came to light that the defendant had bought the insurance policy from the appellant approximately 12 hours after the accident had occurred.

[5] The appellant then filed an originating summons ('OS') in the High Court pursuant to s 96(3) of the Road Transport Act 1987 (Act 333) for a declaration that the insurance policy issued by the appellant to the defendant was void and unenforceable as the defendant had no coverage at the time of the accident. The respondent's application to be added as an intervener was allowed by the High Court. Pending the hearing of the OS, the trial at the sessions court was stayed.

DECISION OF THE HIGH COURT

[6] The High Court agreed with the appellant and found that the appellant cannot be held liable for an accident which had occurred pnor to the issuance of the insurance policy. The respondent/intervener then appealed to the Court of Appeal.

DECISION OF THE COURT OF APPEAL

[7] The Court of Appeal allowed the respondent's appeal and set aside the decision of the High Court. The Court of Appeal found that by the terms of its own contract, the policy becomes effective retrospectively and coverage began at midnight on 27 October 2011 when the date comes into existence. The appellant was held liable under the policy.

QUESTIONS OF LAW

[8] On 6 November 2017 this court granted leave to the appellant on the following two questions of law:

(a) when a motor policy holder obtains insurance cover from an insurer in respect of an accident that had already occurred, does that insurance policy take effect from the date of cover or from the time of issuance of cover? and

(b) is the Court of Appeal correct in law to give a retrospective cover to the policy in breach of s 141 of the Insurance Act 1996 (Act 553) which states that there shall be payment before cover?

SUBMISSIONS FOR THE APPELLANT

[9] Learned counsel for the appellant Dato' Kamalanathan conceded that where time is not stated in the policy, then assumption of risk commences at midnight on the date of issue till midnight on the date of expiry. However

where the date and time are stated in the cover note, learned counsel submitted that assumption of risk commenced on the date and at the time as stated in the cover note. Learned counsel submitted that the Court of Appeal had failed to consider s 2 of the Insurance Act 1996 ('Act 553') (which has since been repealed and substituted by the Financial Services Act 2013) which states that an insurance policy includes the cover note. Section 2 of Act 553 states as follows:

> 'policy' means an insurance policy and includes a cover note or a contract of insurance, whether or not embodies in or evidenced by an instrument in the form of an insurance policy ...

[10] Further, it was submitted that the Court of Appeal had also failed to consider s 141 of the same Act which prohibits an insurer from assuming any risk unless and until the premium is paid. Section 141 provides as follows:

> 141 Assumption of risk
>
> (1) No licensed general insurer shall assume any risk in respect of such description of general policy as may be prescribed unless and until the premium payable is received by the licensed general insurer in such manner and within such time as may be prescribed.

Learned counsel further submitted that the Court of Appeal had also failed to consider that s 2 states that the premium paid is the consideration for the assumption of obligations by the insurer as follows:

> 'premium' means the amount payable to an insurer under a policy as consideration for the obligations assumed by the insurer;

[11] In the present case, learned counsel submitted that based on ss 2 and 141, coverage under the policy and the assumption of risk by the appellant commenced on 27 October 2011 at 2.16pm when the cover note was issued upon payment of the premium, and not at midnight as decided by the Court of Appeal.

[12] In support of his submissions, learned counsel referred us to the decision of the Karnataka High Court in the case of *Smt Asma Begum And Others v Nisar Ahmed And Others* II (1990) ACC 501; 1990 ACJ 832; AIR 1990 Kant 353. In that case, the third respondent was the insurer of the vehicle. The accident had occurred on 17 November 1983 at 10.05am. The insurance policy was issued to be effective from 17 November 1983–16 November 1984. It was submitted for the appellants that once the policy was issued with the commencement date as 17 November 1983, the policy becomes effective from the minute the day commenced. For the third respondent it was submitted that the policy issued on 17 November 1983 was for a period of 12 months commencing from 17 November 1983 (11am) to 16 November 1984, as expressly stated in the policy. The accident had occurred at 10am when the

policy was not in existence. Since there was no cover in existence, thus the insured had no insurable interest. Learned counsel for the third respondent had also referred to s 64-VB of the Indian Insurance Act 1938 which deals with payment of premium and assumption of risk. The relevant part of the provision reads as follows:

> 64-VB No risk to be assumed unless premium is received in advance —
>
> (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may he prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.
>
> (2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

[13] The court found that coverage is only in respect of risk that arose after the date and time specified in the policy. In its judgment the court said, amongst others, as follows:

> ... The premium was paid only on 17-11-1983 for a period of one year and on the payment of premium the policy was issued on 17-11-1983 at 11 am to be effective till 16-11-1984. Therefore, there can be no doubt that it covers the risk arising after the date and time specified on the policy.

With respect to sec 64-V(b), the court said:

> In view of the above provision the risk of the Insurance Company commences only on the payment of the premium either in cash or by cheque. In the present case, as can be seen from the receipt Exhibit R-2 the amount of premium of Rs 2561/- was received at 11 am as expressly stated in the receipt. Therefore, it is beyond doubt that the premium amount was accepted after the accident which had occurred at 10 am. Therefore, the risk of the insurer commenced after the accident, and therefore did not cover the risk arising out of the accident.

[14] Learned counsel submitted that the current trend in India is that insurance policies in which the date and time of commencement are stated are 'special contracts' and urged this court to adopt a similar approach. Learned counsel referred to, amongst others, the decisions of the Supreme Court of India in the cases of *National Insurance Company Ltd v Mrs, Chinto Devi And Ors* (Civil Appeal No 1100 of 1992) and *New India Assurance Co Ltd v Smt Sita Bai & Ors* [2000] 1 MLJ 50 (SC).

[15] In the case of *National Insurance Company Ltd v Mrs, Chinto Devi And Ors*, the question raised before the Supreme Court of India was whether the

A insurance company was liable on a policy taken at a time which was after the time of the accident, though it being of the same date. In that case, the cover note showed that the policy was taken on 23 February 1987 at 4.45pm. The accident had occurred at 11.30am.

B **[16]** Learned counsel for the insurance company had submitted that since there was mention of the specific time of the purchase of the policy, a special contract had come into being based on the decisions of the Supreme Court in *National Insurance Co Ltd v Smt Jijubhai Nathuji Dabhi* (1997) 1 SCC 66 and *New India Insurance Co v Bhagwati Devi And Ors* (1998) 6 SCC 534. In both C these cases, the court held that if there was a special contract, mentioning in the policy the time when it was bought, the insurance policy would be operative from that time and not from the previous midnight. Therefore learned counsel for the insurance company submitted that the policy became effective from D 4.45pm of 23 February 1987 as mentioned in the cover note/the policy itself. The Supreme Court agreed and held that since the accident took place at 11.30am, the appellant would not be liable to pay to the insured.

[17] In the case of *New India Assurance Co Ltd v Smt Sita Bai & Ors*, the cover E note was issued on 16 April 1987 at 9pm. The insurance policy was issued later in which the date of commencement of the insurance policy was recorded as 16 April 1987 (2100 hours). The accident had admittedly occurred on 16 April 1987 at 10am ie before the commencement of the insurance policy. The Motor Accident Claims Tribunal opined that the bus in question was insured with the F insurance company for the period 16 April 1987–15 April 1988 (both days inclusive) and thus the owner as well as the insurance company were liable. On appeal, the High Court opined that the insurance policy covered the period of the accident because the policy would be deemed to have commenced at midnight of 15 April 1987 and 16 April 1987. The High Court dismissed the G appeal. The Supreme Court found that on the facts before the court, the commencement of the policy at 2100 hours on 16 April 1987 was after the accident which had occurred at 1000 hours on 16 April 1987. The Supreme Court found that the Tribunal as well as the High Court were wrong in H burdening the insurance company with any liability. The appeal by the insurance company was consequently allowed. The Supreme Court affirmed its earlier decision in *National Insurance Co Ltd v Smt Jijubhai Nathuji Dabhi*.

[18] The question before the Supreme Court in *Jijubhai Nathuji Dabhi*'s I case was whether the accident had occurred during the operation of the insurance policy. The accident had occurred on 25 October 1983 at 11.14am. The renewal premium of Rs 1,307/- was paid on 25 October 1983 at 4pm. The renewal carried the following terms:

> It is hereby understood and agreed that the renewal premium of Rs 1307/- only under this Policy having been paid on 25.10.1983 and not within the renewal date viz 14.10.1983 the Insurance by this Policy is suspended from 14.10.1983 (4pm) to 24.10.1983.
>
> Further, it is declared and agreed that the cover under this Policy is reinstated and renewed for a further period of twelve months from 25.10.1983 to 24.10.1984 at a premium of Rs 1307/-.

The Supreme Court said that it was clear that the accident had occurred when the renewal had not taken effect. The court affirmed the decision in *New India Assurance Co Ltd v Ram Dayal And Ors* 1990 SCR (2) 570; 1990 (2) SC 164 which had held that in the absence of any specific time mentioned, the contract would be operative from the midnight of the day by operation of the provisions of the General Clauses Act. But in view of the special contract mentioned in the insurance policy, namely, it would be operative from 4pm on 25 October 1983 and the accident had occurred earlier thereto, the insurance coverage would not enable the claimant to seek recovery of the amount from the appellant company.

[19] In the case of *New India Insurance Co v Bhagwati Devi And Ors* the insurance company had sold the policy on 17 February 1989 at about 4pm. A fatal accident involving the vehicle insured had occurred at about 9am. The Motor Accident Claims Tribunal allowed the claim based on the decision in *Ram Dayal*. The Supreme Court of India followed its decision in the case of *Jikubhai Nathuji Oabhi* and said as follows:

> The principle deduced is thus clear that *should there be no contract to the contrary*, an insurance policy becomes operative from the previous midnight, when bought during the day following. However, in case there is mention of a specific time for its purchase then a special contract to the contrary comes into being and the policy would be effective from the mentioned time. The law on this aspect has been put to rest by this Court. There is, thus, nothing further for us to deliberate upon. (Emphasis added.)

[20] Reverting to the present appeal, on the issue of retrospective effect of the insurance cover note learned counsel submitted that the decision by the Court of Appeal is totally contrary to the basic rule of insurance law. Learned counsel referred to the case of *Medical Defence Union Ltd v Department of Trade* [1980] Ch 82 (see *Principles of Insurance Law* (6th Ed) by Poh Chu Chai). In that case Megarry VC referred to the fundamental characteristics found in all insurance contracts and said as follows:

> First, the contract must provide that the assured will become entitled to something on the occurrence of some event ... Second, the event must be one which involves some element of uncertainty ... Third, the assured must have some insurable interest in the subject matter of the contract.

[21] It was submitted that fulfilment of the three conditions is required for insurance cover note to take place. No insurer will cover for an event which had already occurred. In the present case, at the time when the policy was issued the accident had already occurred. So there was no element of uncertainty. The fact that the accident had occurred was within the knowledge of the insured which he did not disclose to the appellant. This was a breach of *uberima fide.* Since at the time of the accident there was no cover in existence, therefore learned counsel submitted that the defendant had no insurable interest. Hence the appellant is therefore not liable under the policy.

SUBMISSIONS FOR THE RESPONDENT

[22] Learned counsel for the respondent Mr Dev Kumaraendran submitted that issuance of a policy should be distinguished from inception of the policy. Relying on the case of *Ram Dayal*, learned counsel submitted that the word 'date' means the entire day commencing from midnight of that date. In the present appeal the time '2.16pm' shows the time of issuance of the policy. The period of cover began to run from midnight of 27 October 2011 when the date 27 October 2011 came into existence or commenced. The terms of the contract itself covers the risk occurring at any hour on 27 October 2011 as the appellant had failed to state in the policy that the risk cover commenced only on conclusion of the contract or upon payment of premium.

[23] Learned counsel further cited the case of *Cartwright v MacCormack (Trafalgar Insurance Co Ltd Third Parties)* [1963] 1 All ER 11 (CA). In that case the insurance company issued a temporary cover note which showed the 'effective time and date of commencement of risk as '11.45am' and '2.12.59'.' It further stated:

> This cover note is only valid for fifteen days from the commencement date of risk ... Under no circumstances is the time and date of commencement of risk to be prior to the actual time of issue of this cover note ... In any event the duration of this cover note shall not be more than Fifteen Days from the date of commencement of insurance stated herein.

The motorist had an accident at 5.45pm on December 17, fifteen days and six hours after the time of commencement of cover under the terms of the cover note. The insurance company argued that the fifteen days start to run at 11.45am on 2 December and therefore expired at the same time on 17 December several hours before the accident occurred. For the defendant it was argued that time did not begin to run till midnight on 2 December and was, therefore, still current at the time of the accident.

[24] In his judgment, Harman LJ said, amongst others, as follows:

> The duration of the insurance company's liability is expressed as fifteen days from the commencement date; it is not fifteen days from the commencement of risk. The

> risk runs, as we know, from 11.45am, but the date of commencement is Dec 2. The policy, therefore, expires fifteen days from Dec 2, and these words, in my judgment, on the ordinary rules of construction exclude the first date and begin at midnight on that day. It would be otherwise if the fifteen days were to be reckoned from the time of commencement of risk, or perhaps even from the commencement of risk.
>
> The insurance company has agreed to hold the insured covered not for fifteen days, but for fifteen days from the date of the policy, and that on the authorities means fifteen days from midnight on the commencement date ...

Learned counsel contended that following the cases of *Ram Dayal* and *Cartwright*, the Court of Appeal is correct in finding that the policy retrospectively covered the time of the accident.

[25] With respect to s 96(1) of Act 333, learned counsel submitted that a policy which was issued after an accident is perfectly valid and enforceable. Relying on the case of *Motor & General Insurance Co Ltd v Dorothy Cox and another* [1990] 1 WLR 1443, learned counsel submitted that there need not be a policy in existence at the time of the accident for s 96(1) to operate.

[26] On the issue of s 141 of Act 553, it was submitted that s 141 is directed at the insurer. It merely provides for an assumption or acceptance of risk by the insurer. The provision is only concerned with whether premiums were received by the insurer before the policy was issued. As such, only an insurer can be guilty of a breach of s 141. It has nothing to do with the terms of the risk or policy which had been duly issued in accordance with s 141. It was submitted that s 141 ought to be read together with regs 63 and 64 of the Insurance Regulations 1996 which states as follows:

> 63 Application
>
> Pursuant to s 141 of the Act, a licensed general insurer shall not assume any risk in respect of motor policies unless and until the premium payable is received in the manner and within the time set out under this Part.
>
> 64 Interpretation
>
> In this Part, unless the context otherwise requires —
>
> 'date of assumption of risk' means the date of issue of the policy regardless of the date of inception of risk;

In the present appeal, the appellant had acknowledged that the policy was issued upon payment of premium. So there was no breach of s 141. Commencement of risk or cover would depend on the terms in the policy.

[27] It was further submitted that irrespective of this court's decision on the two questions of law posed, s 96(1) of Act 333 operates in favour of the respondent as the third party once the policy is delivered. In reply to this,

learned counsel for the appellant referred to s 96(3) which provides that:

> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

OUR DECISION

[28] We will first address the submissions by learned counsel for the appellant that this court ought to adopt the current approach taken by the Supreme Court of India that insurance policies in which the date and time of commencement are specifically stated are described as 'special contracts'. Having considered the authorities, we have no issue with the view that such insurance policies be known as 'special contracts' for the purpose of distinguishing these policies from those where the date and time of commencement are not specifically stated.

[29] Insurance is a contract based upon speculation (per Lord Mansfield in *Carter v Boehm* [1558–1774] All ER Rep 18; (1766) 3 Burr 1905). Like any contract, an insurance contract requires the elements of offer, acceptance and consideration (see *Halsbury's Laws of Malaysia* Vol 20, 2006 Reissue). Under the contract, the insurer assumes his obligation to the insured in return for a money consideration, called the premium (per Gibbs J in *R v Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577; 53 ALJR 719; 27 ALR 263. We find that this principle is reflected in s 141 of Act 553 which specifically prohibits assumption of risk unless premium is paid.

[30] Learned counsel for the appellant is correct in his submissions that the court ought to refer to Act 553, which was the statute applicable at the material time, in deciding this appeal.

[31] As we have alluded to above, s 2 of Act 553 includes the cover note as part of the policy. The cover note is in itself a contract of insurance, governing the rights and liabilities of the parties in the event of a loss taking place during its currency. The assured is, therefore, entitled to enforce the contract contained in the cover note, provided he has complied with its conditions, eg

as to payment of the premium (see ER Hardy lvamy *General Principles of Insurance Law* (6th Ed)). A

[32] We agree with learned counsel for the appellant that in coming to its decision, the Court of Appeal ought to have considered the cover note since Act 553 provides that a policy includes the cover note. We may also add that the Court of Appeal ought to have considered s 141 and regs 63 and 64 of the Insurance Regulations 1996. Section 141 and reg 63 are statutory prohibitions against an insurance company assuming any risk until the premium is paid. Thus under Act 553 assumption of risk commences from the time of payment of premium. B C

[33] The respondent had relied on the authorities of *Ram Dayal* and *Cartwright.* In respect of *Ram Dayal*, we note from the judgment of the Supreme Court in the later case of *New India Insurance Co v Bhagwati Devi And Ors* that *Ram Dayal* is authority for insurance contracts which are not special contracts. The Supreme Court in *Bhagwati Devi*'s case had said, with reference to *Ram Dayal*, that in a case where there is no contract to the contrary, a policy will take effect from midnight of the date when it was taken. Where there is mention of a specific time for its purchase, then a special contract to the contrary comes into being and the policy would be effective from the mentioned time. D E

[34] In *Cartwright*'s case, the policy used the words 'commencement date of risk'. The issue before the court was when did the period of insurance commence. The decision of the court was in relation to the construction of the phrases 'commencement date of risk' and 'commencement of risk'. Wilmar LJ said as follows: F

> ... The operative words to be construed here are 'Fifteen Days from commencement date of risk'. The commencement date of risk is expressed to be Dec 2, 1959. The period of fifteen days, therefore, ran from Dec 2. G
>
> ... If here the cover note had been expressed to be valid for fifteen days from the *commencement of risk*, ... it would no doubt have been proper to calculate the period of fifteen days as fifteen consecutive periods of twenty-four hours commencing at 11.45 a.m. on Dec 2, ie, the commencement of risk. In fact, however, the cover note is expressed to be valid for fifteen days from the *commencement date* of risk. (Emphasis added.) H
>
> ... For these reasons, I do not think that it is possible to escape from the conclusion that at the time of the defendant's accident the period of insurance of fifteen days from the commencement date of risk had not expired. I

Thus the decision in *Cartwright*'s case shows that 'commencement date of risk' means the date of issue of the cover note but where time of issue of the cover note is mentioned, 'commencement of risk' is to be calculated from the time mentioned in the cover note.

[35] Learned counsel for the appellant had also raised other issues which we find unnecessary to address. However having considered the facts in this appeal, we are of the considered view that we need to address briefly the issue of *uberrimae fidei* or utmost good faith because a breach of this principle entitles an insurer to void the contract.

[36] In *Carter v Boehm* Lord Mansfield said:

> ... The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

[37] In the case of *London General Omnibus Co Ltd v Holloway* [1911–13] All ER Rep 518, Kennedy LJ said (see ER Hardy Ivamy *General Principles of Insurance Law* (6th Ed) at p 139):

> No class of case occurs to my mind in which our law regards mere non-disclosure as invalidating the contract, except in the case of insurance. That is an exception which the law has wisely made in deference to the plain exigencies of this particular and most important class of transactions. The person seeking to insure may fairly be presumed to know all the circumstances which materially affect the risk, and, generally, is, as to some of them, the only person who has the knowledge; the underwriter, whom he asks to take the risk, cannot, as a rule, know and but rarely has either the time or the opportunity to learn by inquiry, circumstances which are, or may be, most material to the formation of his judgment as to his acceptance or rejection of the risk, and as to the premium which he ought to require.

[38] The duty of disclosure is provided under s 150(1) of Act 553 which states as follows:

> 150 Duty of disclosure
>
> (1) Before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that —
>
> (a) he knows to be relevant to the decision of the licensed insurer on whether to accept the risk or not and the rates and terms to be applied; or
>
> (b) a reasonable person in the circumstances could be expected to know to be relevant.

[39] In the present appeal it is obvious that at the time the policy was issued, the defendant had not disclosed to the appellant that the motorcycle was already involved in an accident. Hence the defendant had breached the duty

imposed upon him by s 150(1) of the Act.

CONCLUSION

[40] Adopting the approach taken by the Supreme Court of India, we find that the policy under consideration in this appeal where the date and time of issue are mentioned in the cover note is a 'special contract'.

[41] Reverting to the questions posed, our answer to the first question is that an insurance policy will take effect from the time of issuance of cover. Following this, we answer the second question in the negative.

[42] For the reasons mentioned above, we allow the appeal with costs of RM20,000 here and below to the appellant. The decision of the Court of Appeal is set aside. The decision of the High Court is restored. Costs awarded is subject to the payment of allocator. The deposit is refunded.

Appeal allowed unanimously, decision of the COA set aside and decision of the High Court restored.

Reported by Ashok Kumar